In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 206

PAUL DE FINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 315 F. 2d 362.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1963. A petition for rehearing was denied on April 18, 1963. By order of Mr. Justice Harlan, dated May 13, 1963, the time to file a peti-

tion for a writ of certiorari was extended to June 18, 1963. The petition was filed on June 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the finding of the district court that goods moving in foreign commerce were stolen from a wharf.

STATUTE INVOLVED

Section 659 of Title 18 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.
>
> * * * * *

STATEMENT

In the United States District Court for the Southern District of New York, petitioner was found guilty by the court (jury having been waived) under an indictment charging that he stole eight cases of

whiskey moving as part of a foreign shipment "from a wharf at Pier 51, North River, New York". Petitioner was sentenced to imprisonment for two years.

It is not disputed that the evidence showed that petitioner stole the cases of whiskey and that they were part of a foreign shipment. The sole issue raised is whether evidence supports the conclusion that the merchandise was stolen from a "wharf".

The testimony showed that, in the process of discharging the whiskey from a boat, cases were stacked on wooden pallets located in the so-called farm area of the pier. The farm area is immediately adjacent to the pier on West Street, New York, is leased to the pier, and is customarily used for loading purposes (R. 7a-8a).[1] The district court held that the theft had been from a wharf (R. 9a-10a, 18a) and the court of appeals affirmed.

ARGUMENT

The indictment in this case charged and the trier of fact found that the whiskey was taken from a "wharf". There is thus no issue, as petitioner seems to suggest, as to whether the theft must be from one of the facilities specifically mentioned in 18 U.S.C. 659. The only question is whether the term "wharf" as used in the statute includes an area, such as that involved here, which is not actually on the water, but is customarily used in the process of

[1] On the diagram marked as government's exhibit 11 (R. 22a, App. B), the location of the pallets is designated as "P".

unloading cargo. The courts below properly concluded that it does. When Congress prohibited the theft of goods from a wharf, it manifestly was not referring merely to the part of the wharf which juts into the water, but meant to include the whole facility used for wharf purposes, which include the unloading of cargo. Thus the theft from the area regularly used for the unloading of cargo was properly deemed a theft from the wharf. See *United States* v. *Allegrucci*, 299 F. 2d 811, 813 (C.A. 3) in which the court held that theft from the sorting area of a railway express platform could properly be found to be a theft from a platform under Section 659.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JULY 1963

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 692802 1283